

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket No. 07-52

**REPLY COMMENTS OF HANCE HANEY
SENIOR FELLOW AND DIRECTOR
TECHNOLOGY & DEMOCRACY PROJECT
DISCOVERY INSTITUTE**

As a result of the recent federal appeals court ruling that the Commission exceeded its authority when it tried to enforce a nondiscrimination principle in a case involving Comcast and BitTorrent,¹ it is unclear what, if any, jurisdiction the Commission has to enact network neutrality regulation in this or any other proceeding.

The problem is Congress never voted to give the FCC jurisdiction to regulate the Internet. The last time Congress came close to addressing this issue was 1996, when it set up a process for replacing legacy phone regulation with competition and deregulated everything else by establishing separate categories of regulation or deregulation for telecommunications services and information services which essentially corresponded to the preexisting categories of basic and enhanced services adopted by the Commission in 1980.² Enhanced service providers were not “common carriers” and hence were not subject to regulation under Title II of the

¹ *Comcast v. FCC*, No. 08-1291 (D.C.Cir.) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297356A1.pdf.

² Report to Congress, *CC Docket No. 96-45* (Apr. 10, 1998) available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/fcc98067.pdf at ¶¶23, 33.

Communications Act.³ In other words, Congress drew a line in the sand to prevent the spread of harmful regulation. And the Commission subsequently could find no evidence in 1998 that Congress had any intention of expanding traditional telephone regulation to new and advanced services.⁴

Professor Susan Crawford for one proposes that the Commission can assert authority to pursue network neutrality by formally “relabeling” Internet access services as telecommunications services, rather than information services.⁵ As she explains,

The F.C.C. has the legal authority to change the label, as long as it can provide a good reason. And that reason is obvious: Americans buy an Internet access service based on its speed and price — and not on whether an e-mail address is included as part of a bundle. The commission should state its case, relabel high-speed Internet access as a “telecommunications service,” and take back the power to protect American consumers.

Although agencies are free to change their minds for good reason, of course, that’s not the issue here. Broadband Internet access is not telecommunications as a definitional matter. Broadband Internet access provided by telecommunications carriers did not *become* an information service in 2007, that’s just when it finally came out of an FCC closet. Since that time – as broadband service providers point out – broadband Internet access services are even more integrated with enhanced functionality, such as security screening, spam protection, anti-virus and anti-botnet technologies, pop-up blockers, parental controls, online email and photo storage, instant messaging, and the ability to create a customized browser and personalized home

³ Id., at ¶26.

⁴ Id., at ¶45.

⁵ Susan Crawford, “An Internet for Everybody,” *New York Times* (Apr. 10, 2010) available at <http://www.nytimes.com/2010/04/11/opinion/11crawford.html?scp=2&sq=susan%20crawford&st=cse>.

page that automatically retrieves games, weather, news and other information selected by the user.⁶ This is not a description of a telecommunications service, period.

Former Chairman Michael Powell told an interviewer that “to talk about going to Title II is talking about doing something relatively epic, novel and unprecedented.”⁷ He added that he dislikes the idea of Title II for broadband, “because for a regulator versed in what it means, it means thousands and thousands of pages that would fall into this space and we would spend our lifetime trying to clean it up. And the real worry is that we will enter another prolonged period of litigation.”

Commission jurisdiction isn’t necessary to protect consumers in any event. The Federal Trade Commission investigates and brings enforcement actions for allegedly deceptive marketing, advertising, and billing of broadband services.⁸ The FTC also applies antitrust law to protect competition, such as in matters involving access to content via broadband services.

According to a recent study, Commission jurisdiction won’t create badly needed jobs, either. Economy-wide, 65,404 jobs could be put in jeopardy in 2011 as a result of network neutrality regulation, with the total economy-wide impact growing to 1,452,943 jobs affected by 2020.⁹

⁶ Letter from Broadband Providers, *GN Docket No. 09-191* (Feb. 22, 2010) available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020389413>.

⁷ Cecilia Kang, “My Q&A with former FCC chair Powell on how he hates reclassification -- the name and the idea,” *Washington Post* (Apr. 12, 2010) available at http://voices.washingtonpost.com/posttech/2010/04/michael_powell_wants_to_set.html.

⁸ “FTC Testifies on Broadband Internet Access Services,” (Jun. 14, 2006) available at <http://www.ftc.gov/opa/2006/06/broadband.shtm>.

⁹ Coleman Bazelon, “The Employment and Economic Impacts of Network Neutrality Regulation: An Empirical Analysis,” *The Brattle Group, Inc.* (Apr. 23, 2010) available at http://www.mobilefuture.org/blog/archives/new_report_on_employment_and_economic_impacts_from_proposed_net_neutrality/.

Broadband providers argue, for one thing, that they may be forced to prioritize traffic if networks become congested because no one has sufficient incentives to invest in more network capacity. “When bandwidth is scarce, carriers will have to allocate, ration and set priorities regardless of what the rules say, slowing everything down to the lowest common denominator,” according to the author of several widely-acclaimed books on computing and communications.¹⁰

George Gilder also notes that if there is sufficient investment in bandwidth, broadband providers will have “no economic incentive to exclude or harass content from an unaffiliated provider.” That's because if a broadband provider refuses to provide access to appealing content and applications, it could lose customers to a competing broadband provider.

The proof for this conclusion can be found from the fact that the Internet is already open despite the absence of FCC regulation to preserve Internet openness.

As Chairman Kennard noted in 1999, “Consumers love the openness of the network. Those early adopters who are going to migrate from the narrowband world to the broadband world grew up in a culture of openness on the Internet. They are going to insist that they have that same culture of openness in the broadband world.”

Already 96% of households have access to high-speed Internet access services at various speeds, some as low as 200 kilobits per second.¹¹ Upgrading broadband networks to deliver 100,000 kilobits (or 100 megabits) per second to every household in America could cost \$350

¹⁰ George Gilder, “Cap and Trade for the Internet,” *Wall Street Journal* (Mar. 15, 2010) available at <http://online.wsj.com/article/SB10001424052748704131404575118100783269306.html>.

¹¹ “High-Speed Services for Internet Access: Status as of December 31, 2008,” *Industry Analysis and Technology Division, Wireline Competition Bureau, FCC* (Feb. 2010) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296239A1.pdf at Table 19.

billion, according to FCC staff.¹² Much of that investment will have to come from private industry, officials have conceded.¹³

Broadband providers invested almost \$60 billion in 2009 alone in broadband networks.¹⁴

Telephone companies, cable operators, wireless providers and others are all competing to be #1 in broadband, and each firm is anxious to spend whatever it takes. But first investors must provide the funding. They will decide which, if any, firms can buy the necessary equipment and employ the highly-skilled people who can make it all work. Investors are highly sensitive to potential risks and rewards.

Vigorous competition, rapidly changing technology and regulation are the principal risks for any investor in broadband. Of all the risks, regulation is the easiest to control from a public policy perspective.

The prospect of pervasive regulation makes it nearly impossible for investors to assess the relative risks and rewards of further investment. It also threatens possibilities for experimenting with new business models which may or may not be strictly based on a common set of terms and conditions but which hold the promise of making broadband more attractive for consumers who have simply chosen not to connect.

Former Chairman Kennard noted that regulation entails significant costs.¹⁵

¹² Commission Open Meeting Presentation on the Status of the Commission's Processes for Development of a National Broadband Plan, *Federal Communications Commission* (Sept. 29, 2009) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf.

¹³ John Eggerton, "Cover Story: More, Better, Faster: FCC's Broadband Update: Quality Comes At A Price," *Multichannel News* (Oct. 5, 2009) available at http://www.multichannel.com/article/356650-Cover_Story_More_Better_Faster.php.

¹⁴ Letter from Broadband Providers, *supra* note 6.

¹⁵ William E. Kennard, "Consumer Choice Through Competition," Speech to the National Association of Telecommunications Officers and Advisors (Sept. 17, 1999) available at <http://www.fcc.gov/Speeches/Kennard/spwek931.txt>.

It is easy to say that government should write a regulation, to say that as a broad statement of principle that a cable operator shall not discriminate against unaffiliated Internet service providers on the cable platform. It is quite another thing to write that rule, to make it real and then to enforce it. You have to define what discrimination means. You have to define the terms and conditions of access. You have issues of pricing that inevitably get drawn into these issues of nondiscrimination. You have to coalesce around a pricing model that makes sense so that you can ensure nondiscrimination. And then once you write all these rules, you have to have a means to enforce them in a meaningful way. I have been there. I have been there on the telephone side and it is more than a notion. So, if we have the hope of facilitating a market-based solution here, we should do it, because the alternative is to go to the telephone world, a world that we are trying to deregulate and just pick up this whole morass of regulation and dump it wholesale on the cable pipe. That is not good for America.

I have talked to many, many people about this issue, on all sides. No one has offered a practical solution to me that avoids drawing us into this quicksand of regulation and embroiling what is a very nascent marketplace in a situation that I do not think we will be able to work our way out of anytime soon. So, when I look at the cost of regulation versus the benefits, when I look at the prospect that we can have a robust, competitive broadband marketplace, I conclude that we have to resist the urge to regulate and let it play out for just a while longer.

The FCC will ultimately discover that the best way to preserve an open Internet is to sustain current levels of private investment in expanded network capacity. Regulation cannot compel private investment, only discourage it by creating an unpredictable mix of risks and rewards.

Respectfully submitted,

/s/ Hance Haney

Hance Haney
Senior Fellow and Director
Technology & Democracy Project
Discovery Institute

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